In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 313.

BROTHERHOOD OF RAILROAD TRAINMEN, etc., *et al.*,
Petitioners,

vs.

CHICAGO RIVER AND INDIANA RAILROAD COMPANY, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF BROTHERHOOD OF LOCOMOTIVE ENGINEERS AS AMICUS CURIAE.

CLARENCE E. WEISELL,
HAROLD N. McLAUGHLIN,
1706 Union Commerce Building,
Cleveland 14, Ohio,
Attorneys for Brotherhood of Locomotive Engineers.

HORNBECK, RITTER & VICTORY,
1706 Union Commerce Bldg.,
Cleveland 14, Ohio,
Of Counsel.

TABLE OF CONTENTS.

TABLE OF AUTHORITIES.

Cases.

Statutes.

Reports and Hearings.

In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 313.

BROTHERHOOD OF RAILROAD TRAINMEN, etc., *et al.*,

Petitioners,

vs.

CHICAGO RIVER AND INDIANA RAILROAD COMPANY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF BROTHERHOOD OF LOCOMOTIVE ENGINEERS AS AMICUS CURIAE.

This brief is filed on behalf of the Brotherhood of Locomotive Engineers as amicus curiae (sometimes hereinafter referred to as "Brotherhood" or "BLE"). Consent to its filing has been given by all parties to the case, and has been filed with the Clerk of the Court contemporaneously with the filing hereof. The Brotherhood is a labor organization in the railroad industry, is national in scope, and organized in accordance with the Railway Labor Act. Members of the Brotherhood are employed in locomotive engine service; and the Brotherhood, through the General Committees of Adjustment organized individually on the various carriers, is the craft representative of locomotive engineers on approximately ninety-eight per cent of the mileage of the principal railroads of the United States. As such craft representative it is vitally interested in con-

struction and interpretation of the Railway Labor Act (45 U. S. C. §§ 151 *et seq.*) by the courts and its application on the various carriers. The instant case involves the right of railroad employees to strike, which right is of greatest concern to railroad employees. This brief is filed in support of the contention that the Railway Labor Act does not prohibit strikes by railroad employees to enforce the settlement of their disputes with a carrier growing out of grievances or arising out of the interpretation and application of a collective bargaining agreement, and that such strikes are not illegal under that Act.

STATEMENT.

The pertinent facts of this case are contained in the amended complaint and answer and will be fully set forth by the parties and need not be repeated in detail herein. For the purposes of this brief it will be sufficient to state that a strike of employees on the respondent Chicago River and Indiana Railroad, who were represented by petitioner Brotherhood of Railroad Trainmen, was called because of unsettled grievances arising out of (1) claims of certain employees for additional compensation, (2) a claim for reinstatement of one employee to a higher position, and (3) a claim for reinstatement of a discharged employee. All of these grievances had been progressed through the normal handling with the carrier as required by § 3, First (i) of the Railway Labor Act (45 U. S. C. § 153, First (i)). The employees, through their representative, chose not to present these grievances to the National Railroad Adjustment Board, to which Board they could have been presented (45 U. S. C. § 153, First (i)), but called a strike to enforce them, which strike, however, was postponed by reason of the National Mediation Board having proffered

its services. Upon the release by the Mediation Board of its jurisdiction a new strike date was set (R. 6 and 7). In the amended complaint the carrier alleged that the administrative machinery of the Railway Labor Act for the settlement of the alleged grievances was compulsory (R. 5). It further alleged that the controversy between the carrier and its employees did not involve a labor dispute within the meaning of the Norris-LaGuardia Act (29 U. S. C. 101, *et seq.*) and that said Act had no application to the controversy (R. 9). The United States Court of Appeals for the Seventh Circuit held that a strike to enforce these grievances "would be illegal" and that "the Norris-LaGuardia Act does not apply to the case at bar." (R. 35, 37.) 229 F. 2d 926, 931, 932.

QUESTIONS PRESENTED.

The fundamental question in the case is whether the procedure provided in 45 U. S. C. § 153, First (i) for submitting to the National Railroad Adjustment Board disputes growing out of grievances or out of the interpretation or application of collective agreements is mandatory or compulsory so as to make illegal the right to strike to enforce settlement.

A further question is, does a federal court have jurisdiction to issue an injunction against a strike to enforce settlement of such grievances, whether such strike be legal or illegal.

STATUTES INVOLVED.

The statutes involved are: The Railway Labor Act as amended, 45 U. S. C. §§ 151 et seq., and the Norris-LaGuardia Anti-Injunction Act, 29 U. S. C. §§ 101 et seq., pertinent provisions of which are set forth in the appendix hereto.

SUMMARY OF ARGUMENT.

The decision of the court below in essence is one which requires compulsory arbitration of all claims growing out of grievances or interpretation or application of collective agreements between carriers and their employees. It would prohibit all strikes arising out of such matters. It is diametrically opposed to the decisions of this Court which hold, in effect, that it was not intended by the Railway Labor Act to provide compulsory arbitration of disputes but to provide a voluntary system therefor.

Moreover, until approximately the time the instant litigation was begun, it had been the understanding of all concerned with the functioning of the Railway Labor Act that the procedures were not compulsory and that strikes to force settlement of grievances were not illegal. In appearances before a committee of the United States Senate for the purposes of urging an amendment to the Railway Labor Act to outlaw strikes, spokesmen for the carriers stated, in substance, that such legislation should be adopted because the Railway Labor Act did not require that such disputes be taken to the National Railroad Adjustment Board and did not forbid strikes over disputes which could be taken to that Board. The proposed legislation did not reach the floor of Congress but the decision of the court below now finds erroneously that a strike arising from grievance disputes is made illegal by the provisions for the procedure before the National Railroad Adjustment Board.

The holding of this Court in *Slocum v. D. L. & W. R. Co.*, 339 U. S. 239, that as between courts and the Adjustment Board the Adjustment Board has exclusive primary jurisdiction of such disputes, has no application in determining whether the Adjustment Board procedure is compulsory to the exclusion of a strike to enforce settlement of grievances.

The legislative history shows that the 1934 amendment providing for the Adjustment Board did not provide for or authorize injunctions to prevent strikes to bring about settlement of such disputes. While it was the view of the sponsor that strikes ought not to be called for such purposes it was also his view that no authorization for injunctions against such strikes should be included in the amendment.

The voluntary use of procedure of the Adjustment Board is readily distinguished from the required and mandatory duties and definite prohibitions which were enforced in *Virginian R. Co. v. System Federation*, 300 U. S. 515, and *Texas & N. O. R. v. Brotherhood of Ry. & S. S. Clerks*, 281 U. S. 548, the decisions of which cases do not justify the decision below.

Since the Adjustment Board procedure is voluntary and not compulsory there is no specific requirement therein which would override the anti-injunction provisions of the Norris-LaGuardia Act, and this voluntary procedure of the Railway Labor Act does not have the effect of repealing any part of the Norris-LaGuardia Act.

In practical effect the decision of the court below, by holding illegal a strike by the employees in regard to their disputes growing out of grievances or claims, or the Board's decisions thereon, will impede rather than promote the settlement of such disputes. Such holding will withdraw from the employees the historic right to use economic sanctions in collective bargaining for settlements on the property where the great bulk of such disputes must be settled. It would place in the hands of management the free and unrestricted option to deny claims at the conference levels and to decline to place Board awards in effect, subject only to enforcement actions which are accompanied by further delays and other practical dis-

advantages to the employees. It would make the Board a substitute for rather than a supplement to the settlement effort on the individual railroads. The outcome is fraught with the consequence that the employees will be obliged to flood the Board with an additional case load which will result in a breakdown in the functioning of the Board and a destruction of its usefulness.

ARGUMENT.

I. THE RAILWAY LABOR ACT NEITHER EXPRESSLY NOR IMPLIEDLY PROHIBITS STRIKES ARISING FROM DISPUTES GROWING OUT OF GRIEVANCES OR OUT OF THE INTERPRETATION OR APPLICATION OF COLLECTIVE AGREEMENTS.

1. The decisions of this Court do not support the holding of the court below that the Railway Labor Act prohibits strikes based on grievances.

The Railway Labor Act was not intended to outlaw strikes. There is no express prohibition of strikes in any of the provisions of the Railway Labor Act. Although there is no doubt that the purposes of the Act are to provide for the settlement of disputes, including those concerned with the making of collective agreements and also the interpretation and application thereof, and to avoid interruption to commerce and to the operation of the carrier, Congress saw fit not to accomplish these purposes by expressly outlawing strikes. Rather, Congress provided new machinery which could be used in an endeavor to settle disputes. As was said by the Court of Appeals for the District of Columbia in *Washington Terminal Company v. Boswell*, 124 F. 2d 235, 247 (aff. 319 U. S. 732, by an equally divided court):

> "The Railway Labor Act was designed not to outlaw the right to strike, but merely to prevent the necessity for its exercise."

The same view was expressed by this Court in *Moore v. Illinois Central R. Co.*, 312 U. S. 630, 635, where it is said:

> "For neither the original 1926 Act, nor the Act as amended in 1934, indicates that the machinery provided for settling disputes was based on a philosophy of legal compulsion. On the contrary, the legislative history of the Railway Labor Act shows a consistent purpose on the part of Congress to establish and maintain a system for peaceful adjustment and mediation voluntary in its nature."

As this Court has previously indicated, notably in the case of *Elgin, Joliet & Eastern Railway Co. v. Burley*, 325 U. S. 711, 724, the types of disputes between carriers and their employees with which the Act is concerned have been divided into two classes, denominated major and minor disputes. Generally, the major disputes are those arising out of the formation or modification of collective agreements, while the so-called minor disputes are grievances arising out of the interpretation and application of agreements already entered into. In the case of major disputes, the Act provides for the machinery of mediation which may be invoked by either of the parties to the dispute or may be proffered by the National Mediation Board, 45 U. S. C. §§ 154, 155. If mediation fails, voluntary arbitration is to be urged by the Board. If arbitration is not accepted by the parties, an Emergency Board may be created by the President of the United States to investigate and report upon the dispute, 45 U. S. C. § 160. While mediation and the Emergency Board processes are functioning as provided in the Act, strikes are postponed but not prohibited. The use of these processes when they are

invoked in an effort to settle a dispute is required, but nothing in the Act concerning them in any way prohibits a strike after these processes have been completed if the dispute is not settled by their use.

With respect to the settlement of grievances, the Act expressly requires only that disputes between a carrier and its employees "shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes," (45 U. S. C. § 153, First (i)). After the disputes have been so handled the next step mentioned in the Act is a submission of the dispute to the proper division of the National Railroad Adjustment Board, but whereas the Act requires that the disputes *shall* be handled with the proper officers of the carrier, it provides, with respect to further handling, only that "the disputes *may* be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board." (45 U. S. C. § 153, First (i)). When disputes have been submitted to the Adjustment Board the awards of the Board "shall be final and binding upon both parties to the dispute except as insofar as they shall contain a money award." (45 U. S. C. § 153, First (m)).

It is submitted that the distinction made in paragraph (i) in the use of the words "shall" and "may" is a real distinction. It would have been a simple matter for Congress to have provided a mandatory requirement that if disputes were to be pressed beyond the refusal of the carrier's highest designated officer they should be taken to the Adjustment Board. If such had been the intention of the Act Congress could well have stated in subparagraph (i) that, failing to reach an adjustment with the carrier's officers "the disputes (if they are to be pressed further)

shall be referred by petition of the parties, etc." [1] Instead, Congress said only that if adjustment failed with the carrier the disputes *may* be referred to the Board. The language chosen made available the procedure before the Adjustment Board if, as and when the procedure was voluntarily invoked. The hope may well have been that the Board procedure would always be utilized, but a strike, as an alternative, was neither expressly nor impliedly prohibited.

The case of *Slocum etc. v. D. L. and W. R. Co.*, 339 U. S. 239 (quoted by respondent in brief below), which held that claims arising out of the interpretation or application of collective agreements and involving questions of future relations between a carrier and its employees could not be submitted to the courts because the jurisdiction of the National Railroad Adjustment Board was exclusive, it is submitted, is not authority for the decision of the court below. The *Slocum* case considered only the alternatives of submission to a court and submission to an established administrative tribunal. That holding was in accord with long established and generally accepted doctrine that where there is an existing non-judicial tribunal for deciding specific controversies, whether such tribunals be statutory or be established within the framework of the organization involved, resort may not be had to courts for the adjudication of such controversies. *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U. S.

---

[1] In Section 10 of the Act (45 U. S. C. 160), which provides that when an Emergency Board has been appointed a threatened strike must be postponed until thirty days after that Board has made its report, there is no uncertainty concerning the requirement for such postponement. The prohibition is clear and definite that until the said thirty day period has expired "no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose."

1; *Myers v. Bethlehem Shipbuilding Corporation*, 303 U. S. 41.

The basis of decision that courts will not hear and determine controversies where other tribunals have been established to decide them, at least until after such remedies have been exhausted, appears to be found in the expectation that if the established tribunals are used the courts in most instances will not be called upon to decide these controversies. But the rationale of decisions which require submission to the non-judicial tribunals when the alternative is submission to the courts, in order to prevent the courts being clogged with a huge multiplicity of unnecessary suits, has no application when the jurisdiction of the court is not invoked and the alternative is an employees' strike. The right of employees to organize into unions for their mutual benefit and protection and to strike has long been recognized by the courts and has been protected by statute, as for example, by certain provisions of the Clayton Act (29 U. S. C. § 52), and the Norris-LaGuardia Act (29 U. S. C. §§ 101 et seq.).

Chief Justice Taft, speaking for the court, in *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184, at p. 209, said:

> "Labor unions are recognized by the Clayton Act as legal when instituted for mutual help and lawfully carrying out their legitimate objects. They have long been thus recognized by the courts. They were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to

deal on equality with their employer. They united to exert influence upon him and to leave him in a body, in order, by this inconvenience, to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth. The right to combine for such a lawful purpose has, in many years, not been denied by any court. The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital."

This right to strike is a long existing common law right and continues to exist in the absence of some statutory prohibition to the contrary. A statement thereof is found in the opinion of the United States Court of Appeals for the Second Circuit in *Douds v. Local 1250, etc.*, 173 F. 2d 764, at p. 770, where it is said:

> "As we have already indicated, the right to bargain collectively and the right to strike and induce others to do so, are derived from the common law; it is only in so far as something in the Act (Taft-Hartley Act) forbids their exercise that their exercise becomes unlawful."

Any statutory prohibition of the right to strike would be clearly in derogation of the common law right and would require a clear and explicit statement to that effect in its enactments. Such prohibition is not to be implied from the fact of existence of a tribunal to which voluntary resort may be had. While one of the express purposes of the Railway Labor Act is to avoid interruptions to commerce (45 U. S. C. § 151a) it is a significant fact that nowhere in the Act is it stated that a strike shall be prohibited. With this purpose so well known to Congress it can hardly be claimed that it overlooked placing a pro-

hibition against strikes in the Act, if such had been its intention. So to contend would be so unreasonable as to be practically absurd. On the other hand, if Congress had intended to prohibit strikes, a single and simple phrase could have stated such intention. With the long history of refusal of our courts to curtail or prohibit the right to strike, the only proper conclusion, it is submitted, is, as indicated in *Washington Terminal Company v. Boswell, supra,* that by enactment of the Railway Labor Act there was no intention to outlaw the right to strike but merely to prevent the necessity for its exercise.

2. The practical construction which has been given to the Act shows that the 1934 amendment did not outlaw strikes over grievances.

We submit the further point, which we believe to be of highly significant pertinence, that the practical construction which has been placed upon this Act by the parties most interested, namely, the employees and the carriers, and also by the National Mediation Board which is constantly concerned with the administration of the Act, demonstrates clearly that the 1934 amendment establishing the National Railroad Adjustment Board did not prohibit, and was not intended to prohibit, strikes arising out of grievances or claims based upon the interpretation and application of collective agreements.

It is obvious, of course, that the employees have not considered that the Railway Labor Act in any of its provisions prohibited strikes. Until after the decision of this court in the *Slocum* case, *supra,* it is apparent that the carriers did not claim that there was any prohibition against strikes to be gleaned from the Act. From 1934 until 1950 there had been strikes and threatened strikes due

to grievances arising out of the interpretation and application of collective agreements in force. Perhaps the most notable of these were two strikes, involving all crafts of operating employees, which occurred in 1949, one on the Wabash Railroad and the other on the Missouri Pacific Railroad.[1] The former lasted approximately eight days and the latter forty-five days. In neither of these cases, nor, so far as we are aware, in any strike or threatened strike arising prior to the time of these strikes, had the carrier sought to have them enjoined or raised any question as to the legality of such strikes or as to prohibition thereof by the Railway Labor Act.

Probably the reason for the absence of any litigation seeking injunctions against strikes over grievances is to be found in the definite view of the carriers that there was no prohibition against such strikes to be found in the Act. While the present law with reference to the National Railroad Adjustment Board has been in effect without change since June of 1934, the contention of the carriers in the instant case that strikes arising out of disputes over claims and grievances are illegal, is of recent origin, extending back from the present only two or three years. As late as 1950 it was the legal position of the carriers that nothing in the Act prevented strikes over unsettled claims or grievances. In that year there was introduced in the United States Senate by Senator Donnell of Missouri a bill seeking to outlaw strikes on railroads. (S. 3463, 81st Cong. 2nd Sess.). Hearings were held upon this bill by a Sub-committee of the Senate Committee on Labor and Public Welfare, but the bill was never acted upon by the

---

[1] See Fifteenth Annual Report of National Mediation Board to Congress, pp. 3, 13, and Sixteenth Annual Report of that Board, pp. 4, 25.

Senate. However, considerable testimony was taken by the Senate Sub-committee.

A number of witnesses on behalf of the carriers either appeared in person to testify or presented statements to the Sub-committee which were read to that committee. The testimony of some of these witnesses left no doubt that in the view of the carriers the Railway Labor Act did not prohibit strikes, including strikes growing out of grievances or out of the interpretation or application of agreements. One of the witnesses for the carriers whose statement was read to the Sub-committee was Daniel P. Loomis, who was Chairman of the Association of Western Railroads, and who appeared on behalf "of the railroads members of the Association of American Railroads which comprises practically all of the Class I railroads of the United States, and somewhat in excess of 95% of the entire railroad industry." (Hearings, S. 3463, 81st Cong., 2nd Sess., p. 85). On the point of whether the 1934 amendment prohibited strikes, Mr. Loomis, in his statement to the Sub-committee, said (Hearings, p. 86):

> "I should make it clear that the cases which are referable to the National Railroad Adjustment Board are not cases where either side is seeking to change an agreement or to secure different wages, rules or working conditions. These cases only involve the proper interpretation of the contracts in effect or a grievance arising under said contract. There is no excuse for a strike in any of these cases. * * * The parties can submit the question to the National Railroad Adjustment Board; they can arbitrate it under the provisions of the Railway Labor Act; they can agree to set up a special Adjustment Board on the particular property to dispose of such disputes. Surely a strike should not be called because of the failure of the parties to agree on a proper interpretation of a con-

tract when the law provides means for securing a binding interpretation.

S. 3463 would outlaw strikes in these types of cases and we are heartily in accord with the view that such strikes should be outlawed."

Mr. Loomis later appeared in person at the hearings for questioning. He testified further with reference to the absence of any compulsory requirement for use of the Adjustment Board procedure and as to the lack of any prohibition against strikes, as follows (Hearings, p. 436):

"Some carriers had attempted to secure a judicial interpretation of their contracts by bringing declaratory judgment actions, but the United States Supreme Court, in the recent decisions in *Slocum v. Delaware, Lackawanna & Western* and *Order of Railway Conductors v. Southern Railway* has held that the carrier cannot bring a declaratory judgment suit and that the National Railroad Adjustment Board has sole and exclusive jurisdiction.

"Mr. Justice Reed dealt with the evils of this result very clearly in his dissenting opinion. The result of these decisions is that the carrier can secure an interpretation of its contract only through the National Railroad Adjustment Board, but the unions do not even have to take a case to the Adjustment Board and instead are free to strike to secure the interpretation they desire regardless of what the contract itself may say.

* * *

"The present situation resulting from the Lackawanna and Southern Railway decisions is that the union may pursue any course it desired to secure an interpretation of a contract. It can submit the case to the Adjustment Board or it can threaten a strike, but the carrier is left only the remedy of submitting the case to the Adjustment Board and even if it does

so the union can still strike in an attempt to secure the interpretation it wishes." [1]

---

[1] See also Proceedings, 1951, Section of Labor Relations Law, American Bar Association, pp. 75-86. Mr. Loomis was a member of the Committee on Railway Labor Act which submitted a report to the Section. He was one of the majority signing the report, which contained, among other things, the following (p. 80):

> "The ordinary individual grievance procedure should continue along present lines and made clearly compulsory under an amendment of the Railway Labor Act, and awards in respect to the same should be made final, binding and enforceable by appropriate court actions wherever they are not given full force and effect. In other words, an award against a railroad for remuneration of any kind should be transposable into an immediate judgment upon a showing that the procedure was regular and the arbitrational awards are in fact made. Strikes in relation to the individual grievances, or because of disappointment with respect to awards in connection with individual grievances, should be flatly prohibited and subjected to penalties and liabilities for damages and for contempt where injunctions may be violated."

In the conclusion of the report of the majority of the Committee appears the following, pp. 80, 81:

> "2. Labor disputes of a minor nature involving individual grievances should continue to be subjected to essentially the present procedure *but it should be made compulsory*. The conclusions reached in such way should, after being approved in a suitable court review, be made final and binding upon all parties excepting that any disappointed grievance claimant should be entitled to quit his employment as an individual if he desires to do so." (Emphasis supplied.)

This Committee was composed of seven members, three of whom, representing the labor point of view, dissented. In the dissent appears the following, p. 82:

> "An examination of the printed record of those hearings (on the Donnell bill) will show the great detail to which the subject matter was pursued, and will readily indicate the intense interest of the Senators of the Sub-Committee. During the time the hearings on the Donnell bill were in progress two railroad strikes were called. The atmosphere was ideally suited to the hopes of those who sought congressional approval of the legislation. Yet, after the complete and comprehensive hearings described above, and despite

(Continued on next page)

The late J. Carter Fort, who was then Vice President and General Counsel for the Association of American Railroads, also appeared before this Sub-committee to testify in support of the Donnell bill, and, with reference to the disputes referable to the National Railroad Adjustment Board, said in part as follows (Hearings, p. 13):

> "As to disputes concerning the interpretation of agreements, the present law does afford an opportunity for employees to obtain final and enforceable decisions through the machinery of the National Railroad Adjustment Board set up under the provisions of the amendments of 1934. However, the law does not require that employees take such disputes to the Adjustment Board or abide by the decisions of the Board. And it does not forbid strikes in connection with disputes falling within the jurisdiction of the Adjustment Board, and there have been many strikes of that kind."

It therefore appears that the question of the legality of a strike arising out of grievance claims was first raised after the decision of this Court in the *Slocum* case, and indeed not until two or three years after that decision, when it was sought to translate an effect of the holding of the court with reference to the exclusive jurisdiction of the National Railroad Adjustment Board into a holding as made by the court below, the effect of which would be to outlaw strikes arising out of grievances. As we have

---

(Continued from preceding page)

the background of railroad work stoppages, only one vote in the Senate Committee on Labor and Public Welfare, that of Sen. Donnell, was cast to report the bill favorably."

The report of the ABA Committee on Railway Labor Act indicates no disagreement on the part of the members of the Committee that the present Railway Labor Act does not prohibit strikes for the enforcement of disputes arising out of grievances.

demonstrated above, we submit that the contention of the carriers and the holding of the court below that the 1934 amendment of the Act giving jurisdiction of the National Railroad Adjustment Board to decide grievance claims submitted to it thereby abolished the right to strike over grievances, constitute an unwarranted effort to stretch the *Slocum* decision beyond all reasonable bounds.

A view similar to that of the A. A. R. witnesses, as to the effect of the Act apparently was taken by the American Short Line Railroad Association. In its "Agenda for Forty-Second Annual Meeting" held October 11-12, 1955, appears the following, on pp. 84-86:

> "* * * The following Legislative policies are offered for consideration by the membership.
>
> *The Association Favors*
>
> * * *
>
> F-7. Amendment of Railway Labor Act in the following particulars:
>
> (f) To provide that the present jurisdiction of the Board be made mandatory and exclusive as to all parties.
>
> (g) To prohibit strikes and lockouts as to all disputes subject to the Board's jurisdiction, with appropriate penalties for violations."

The practical construction placed upon the Act in this respect by the National Mediation Board is significant.

In Section 5, First, of the Railway Labor Act (45 U. S. C. § 155, First) it is provided that:

> "The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time."

In carrying out its functions under this particular authorization the Board has from time to time made proffer of

its services when a strike or strikes appeared likely and when its services had not been invoked by parties to the dispute. In its Twentieth Annual Report to Congress for the fiscal year ending June 30, 1954, p. 3, in the section of the Report headed "Strikes and Threatened Strikes," appears the following:

> "The Board for many years has consistently held to its policy of declining to accept for mediation disputes which, under Section 3 of the Act, are properly referable to the National Railroad Adjustment Board. * * * There have, however, been occasions where it has been necessary for the Board to proffer its mediation services in situations which threatened to result in a labor emergency, without regard to the causes. When occasions of this nature arise in connection with strike threats which involve dockets of time claims and grievances, it is the earnest endeavor of the Board to persuade the parties to submit such dockets to determination by the creation of a system adjustment board for that particular dispute."

In the same section of the Report, p. 6, appears the following significant statement:

> "While there is no prohibition in the Act against the exercise of economic force by either party to a dispute, and there can be none under our free institutions, extended work stoppages invariably result in material losses for all parties concerned. Greater use of the principles of arbitration, which also includes the procedure of special adjustment boards, will minimize such loss to employees and employers, as well as the attendant inconvenience to the public affected by strike actions. * * * The fullest use of the procedures contained in the Railroad Labor Act is again commended to both sides in labor disputes as the best means available to prevent such controversies from reaching the final stage of direct action."

With the foregoing practical constructions of the Act by all parties concerned therewith, and in view particularly of the permissive language of § 3, First (i) of the Act, we submit that the construction of this provision placed upon it by the court below is wholly unwarranted.

II. THE LEGISLATIVE HISTORY OF THE 1934 AMENDMENTS TO THE RAILWAY LABOR ACT SHOWS THAT THE PROVISIONS FOR THE ESTABLISHMENT OF THE NATIONAL RAILROAD ADJUSTMENT BOARD WITH JURISDICTION TO DECIDE DISPUTES GROWING OUT OF GRIEVANCES OR THE INTERPRETATION OR APPLICATION OF COLLECTIVE AGREEMENTS DID NOT PROHIBIT, AND WERE NOT INTENDED TO PROHIBIT, STRIKES WITH RESPECT TO SUCH DISPUTES.

The most important of the 1934 amendments to he Railway Labor Act was one which created the National Railroad Adjustment Board (45 U. S. C. § 153). The original Act of 1926 had provided for the establishment of regional or system boards by the voluntary agreement of the parties involved. These boards were to be composed of an equal number of representatives from the two sides, and no provision was made for a decision in the event of deadlock. Only a few of such boards had been established and they had proven to be unsatisfactory and little had been accomplished.

The principal sponsor of the 1934 amendments of the Railway Labor Act was Interstate Commerce Commissioner Joseph B. Eastman, who at the time was also Federal Co-ordinator of Transportation. His testimony was given at length before the committees of both the Senate and the House of Representatives. In the hearings before the Senate Committee on Interstate Commerce (73rd

Cong., 2d Sess., Hearings on S. 3266, a Bill to Amend the Railway Labor Act, etc.) Commissioner Eastman said, as reported at p. 17 of the hearings:

"Another difficulty with the present law, even where an Adjustment Board has been established, is that, although its decisions are final and binding upon both parties, there can be no certainty that there will be a decision. The two sides are now evenly represented on these Boards, and hence deadlocks are a very distinct possibility. Not only are they possible but they have occurred in a large number of cases, and of late there has been a continually growing tendency toward such deadlocks. The number now existing runs into the hundreds. Because of the lack of Adjustment Boards in many situations and the tendency of those which do exist to deadlock, very disturbing conditions have at times been created, especially in recent months.

The bill before you, S. 3266, attempts to remedy both of these deficiencies in the present law. It provides for the creation of a National Adjustment Board to which unadjusted 'disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions' *may be referred*. (Emphasis supplied.)

The National Adjustment Board is to handle only the minor cases growing out of grievances or out of the interpretation or application of agreements. Provision is also made so that deadlocks will be impossible. When the regular members, who will be equally divided between the two sides, disagree, they must call in a neutral member appointed by the Mediation Board to decide the case. * * * They can agree upon the neutral member, but if they do not agree he has to be appointed by the Mediation Board.

> The willingness of the employees to agree to such a provision is, in my judgment, a very important concession and one of which full advantage should be taken in the public interest. I regard it as, perhaps, the most important part of the bill."

In the hearings before the Senate Committee there apparently was no discussion or question raised as to whether the proposed establishment of a National Adjustment Board would have any effect on the right of employees to strike after an unfavorable decision of the Board or if they did not wish to submit their grievances to the Board. However, in the hearings before the House Committee on Interstate and Foreign Commerce on H. R. 7650 (73rd Cong., 2d Sess.), a substantially identical bill which had been introduced in the House, there was some discussion and questioning as to the effect of the provisions for the National Adjustment Board upon the right of the employees to strike with respect to grievances and claims. Commissioner Eastman made substantially the same general statement with respect to the purpose of the establishment of the National Adjustment Board as had been made in the earlier hearings before the Senate Committee. He said (p. 47):

> "Provision is also made so that deadlocks will be impossible. * * *
>
> Now it seemed to be very generally agreed in the hearings before the Senate Committee that there ought to be a mandatory provision for the creation of these Boards of Adjustment, and also it seemed to be agreed that the provision for appointing a neutral member in case of a deadlock was an excellent provision and ought to be in the law. The difference of opinion which developed before the Senate Committee was whether these Boards should be national in scope or regional."

At p. 61:

"Mr. Wolverton. Does this Act in any way, Mr. Eastman, provide that it will be a violation of law if they do not comply with the decree and the order that is made?

Commissioner Eastman. It says that the award shall be final and binding.

Mr. Wolverton. Does this bill attempt in any way to enforce that provision; and if so, is it contrary to public policy to put such a provision in the bill?

Commissioner Eastman. Page 19, line 19, it says:

'The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.'

Mr. Wolverton. Is there any provision in this bill that would enable the court to obtain an injunction against a labor organization which is dissatisfied with the final decree and refuses to comply with it?

Commissioner Eastman. Well, I am not able to give you an answer to that. That is a legal question, to be frank with you, that I have not gone into.

Mr. Wolverton. It would seem to me that the provisions or language of the bill itself would answer that question. And is it contrary to public policy to have such a provision in there?

Commissioner Eastman. Well, it is my own opinion that there ought not to be strikes with reference to minor grievances of that sort. I should be very unwilling to take away from the employees the right to strike on major issues, but these are not major issues.

Mr. Wolverton. The provision which I read a few moments ago protects the individual employee so that no court can order him to work, and no court can issue an injunction preventing him from striking nor in any

way prevent the free exercise of his own individual discretion as to whether he shall work or not work.

Is there any language that is equally clear with respect to the organizations? I understood you are not certain that the language would apply to any other than an individual.

Commissioner Eastman. Well, I think that the carrier can enforce the order. For instance, if the order provides that certain working rules shall be interpreted in the same way, the carrier, of course, can apply the rule in that way.

Now, the only question I am in doubt about is whether or not there should be an injunction under this Act to prevent a strike. Now, I am not clear about that.

Mr. Wolverton. Do you think that there should be such a provision in the bill?

Commissioner Eastman. *I would rather see it carried out without that, because I do not believe you are going to have that question arise.*

Mr. Wolverton. Do you consider it better policy to leave it out—

Commissioner Eastman. *Well, no particular question has been raised about this matter of enforcement.*

p. 62:

Mr. Wolverton. *Let us first have a frank understanding as to whether it is included or is not included in the bill and then we can determine the policy as to whether it should be or should not be in the bill; but it certainly seems to me that the bill ought not to be left indefinite either from the standpoint of the carriers or the standpoint of the employees. We should know just what the situation is."*

There then followed a discussion between Mr. Wolverton and Mr. Eastman's legal adviser, Mr. Carmalt, wherein Mr. Carmalt stated, among other things, that the question had not arisen before, and that he was "more or less think-

ing out loud." The discussion of the point was then continued by Mr. Eastman.

P. 64:

"Commissioner Eastman. I may say, so far as I am concerned, it had not seemed to me that matter was a contingency of importance, because I cannot conceive of organizations striking over the settlement of grievances, particularly when they had been passed upon by an impartial tribunal under Government auspices.

P. 65:

It is a serious enough thing to strike when a major matter is involved; but when you have only minor grievances and they have had full opportunity to be heard and have had their day in court before a tribunal, it hardly seemed to me that that was a question that was likely to arise. *My own idea would be, let that question arise out of experience and find out whether there is actual need for any such power before you provide for issuing injunctions for preventing strikes.*

Mr. Wolverton. *Mr. Commissioner, that may be true. Maybe that is a proper course to pursue, but what I am seeking to find out is whether this language declares something else to be the policy.*

Commissioner Eastman. Yes.

Mr. Wolverton. And, I am endeavoring to find out just what policy we are adopting. It may be that a hands-off policy is what we should adopt, but in that case, I do not want to see something in the bill that carries a different effect. *That is the purpose of my questions, in trying to find out definitely what is the purpose or effect of the provisions in this bill.*

Commissioner Eastman. *I shall be glad to give the matter study and let you know just what my opinion is upon it.*" (Emphasis supplied.)

So far as we have been able to determine, no further report was made to the committee by Mr. Eastman.

A consideration of the statements of Commissioner Eastman with respect to whether or not a strike would be illegal and subject to injunction can lead to no other conclusion than that there was no prohibition in the amendments against the strike called to enforce settlement of grievances. He was not at any time willing to express the view that the Adjustment Board procedure did prohibit, or was intended to prohibit, strikes for such purpose. True, he expressed the view that he did not think the organization would strike over the settlement of grievances, but he did not advocate including authority to issue injunctions. By requoting three statements from the above, we summarize what we believe were his conclusions as to such authority being found in the amendments:

Page 61 of the report where he said:

> "Now, the only question I am in doubt about is whether or not there should be an injunction under this Act to prevent a strike. Now I am not clear about that. * * *"

Again, on the same page:

> "I would rather see it carried out without that because I do not believe you are going to have that question rise."

And at p. 65:

> "My own idea would be, let that question arise out of experience and find out whether there is actual need for any such power before you provide for issuing injunctions for preventing strikes."

Congressman Wolverton's comments quoted above showed a definite understanding on his part that the proposed amendments did not specifically cover the point of whether strikes over grievances would be illegal.

With reference to Commissioner Eastman's statement quoted above that he could not conceive of organizations striking over settlement of grievances, we think an observation concerning the importance of settlement of grievances is proper. These grievances were referred to as minor disputes, but apparently what was not given consideration was that accumulations of minor disputes could readily become major disputes, and such was the case in the Wabash and Missouri Pacific strikes hereinabove mentioned, and such is the case with reference to the threatened strike in the instant suit.[1]

George M. Harrison, appearing as spokesman for the Standard Railway Organizations before the House Committee, reviewed at some length the dissatisfaction which the employees had with reference to the settlement of claims and grievances, and referred to the unsatisfactory method of adjustment of grievances under the Adjustment Board procedure of the 1926 Act. He then said (p. 81):

---

[1] In case No. 56, October Term 1956, before this court, *Pennsylvania Railroad Company, et al. v. Rychlik, et al.*, a brief, at the invitation of the court, was filed by the Solicitor General. In Appendix A to that brief is set forth a letter dated September 19, 1956 from the Chairman of the National Mediation Board to the Solicitor General. In that letter appears the following:

> "It is axiomatic to say that the prompt settlement of grievances is necessary to preserve good relations between the carriers and their employees. The failure to settle such may lead, and has led, to disturbances interfering with the transportation system of the country. Unfortunately, through the past twenty years, there has slowly been built up on the First Division of the National Railroad Adjustment Board a large backlog of cases. For several years this backlog has been in the neighborhood of approximately 3,000 cases, which represents a minimum of five years backlog based on the Board's normal productivity.
>
> Because of this backlog on the First Division, organizations have been reluctant to take their cases to the Division and have sought a solution to the settlement of the grievance disputes by incorporating them into strike dockets."

"So out of all of that experience, and recognizing the character of the service given to the people of this country by our industry and how essential it is to the welfare of the country, these organizations have come to the conclusion that in respect to these minor grievance cases that grow out of the interpretation and/or application of the contracts already made, that they can very well permit those disputes to be decided, if they desire to progress them, to be decided by an Adjustment Board. When that decision is made the law will provide that it shall be final and binding on the parties and enforceable in the courts. * * *"

At page 35 of the hearings before the Senate Committee, Mr. Harrison said:

"It is a very troublesome problem and I just want to make this observation. These railway labor organizations have always opposed compulsory determination of their controversies. We have lived a long time and have got a lot of experience, and we know that these minor cases that develop out of contracts that we make freely, and which we have the right and privilege of entering into and have something to say about their terms, we are now ready to concede that we can risk having our grievances go to a Board and get them determined, and that is a contribution that these organizations are willing to make."

We do not find anything in Mr. Harrison's statements to the Committee which indicates that strikes to enforce grievances or claims would be prohibited. What the organizations were willing to do, as appears from his testimony, was to set up a Board which, if the grievances were progressed to it, would have a right to make a final decision. A decision would be final and binding only after a grievance had been voluntarily submitted to the Board for decision. This was the concession which he said the employees were making. The departure in the amendment which constituted a concession on the part of the

employees was a willingness to have a final decision by a neutral on disputes voluntarily submitted to the Board in the event that a decision could not be reached by the equal representation of both carriers and employees.

Mr. Harrison also appeared in opposition to the Donnell bill before the Sub-committee conducting the hearings on that bill (S. 3463, 81st Cong., 2nd Sess.). On the point here under consideration, namely, whether the Adjustment Board provisions of the Railway Labor Act were intended to outlaw strikes, the following statements of Mr. Harrison with respect to the Donnell bill are pertinent as showing that Mr. Harrison did not intend in 1934 to convey the impression that he thought strikes were prohibited by the Adjustment Board provisions. At the hearing before the Sub-committee on the Donnell bill, p. 205, Mr. Harrison said, in part:

> "You see, under the present law, if we have a complaint against a railroad company that one of our contracts has been violated, that we cannot settle after a conference with railway management, *we may, at our own election, take that dispute to the Railroad Adjustment Board for decision, or we may strike if we want to under the present law,* but we have gone, as the record shows, to the Adjustment Board, went through all the delay and all the hearing and all the expense to get a decision. Now we get the decision in favor of the applicants, or plaintiffs, the Union, and the railroad says, 'pooh-pooh, we won't put it into effect. If you want to get that out of us go to court and sue us' (under the enforcement provision of the Railway Labor Act). Well, we don't want to sue, because we tried the case once, according to the agreed upon procedure, so we threaten to strike, against an arbitrary refusal, to put into effect the decision; after they had their day in court. Now they want in this bill proposed by you, to have the right to go into court and get a review of every decision that is handed down

by the Adjustment Board. Well, where would we ever get anything settled? That is nonsense, you can't handle labor relations like that." (Emphasis supplied)

The Reports of the House and Senate Committees on the pending legislation did not suggest that the proposed Adjustment Board provisions would be compulsory or that a strike called to enforce settlements of grievance claims would be illegal or subject to injunction. The report of the House Committee was made on H. R. 9681, which was one of two similar bills which had been introduced in the House, the other being H. R. 7650. We are certain there is no contention that the 1926 Act contained any anti-strike provisions. The report of the House contained the following statement:

"The bill does not introduce any new principles into the existing Railway Labor Act, but it is designed to amend that Act in order to correct the defects which have become evident as the result of eight years of experience." (House Report No. 1944, on H. R. 9681, 73rd Cong., 2nd Sess., p. 2.)

* * * * *

"The second major purpose of the bill is to provide sufficient and effective means for the settlement of minor disputes known as 'grievances,' which developed from the interpretion and/or application of the contracts between the labor union and the carriers fixing wages and working conditions. * * *

"Many thousands of these disputes have been considered by boards established under the Railway Labor Act; but the boards have been unable to reach a majority decision, and so the proceedings have been deadlocked. These unadjusted disputes have become so numerous that on several occasions the employees have resorted to the issuance of strike ballots and threatened to interrupt interstate commerce in order to secure a postponement. * * * This condition should be corrected in the interest of industrial peace and

uninterrupted transportation service. This bill, therefore, provides for the establishment of a national Board of Adjustment to which these disputes *may* be submitted if they shall not have been adjusted in conference between the parties." (Emphasis supplied.) (House Report No. 1944, pp. 2 and 3.)

Again, we submit, that the use of the word "may" in the House Committee report is of real significance. Having just referred in the report to the fact that many strikes had been called because of grievances not adjusted under the existing Act, the Committee used the permissive "may" with respect to the use of the Adjustment Board machinery. Had the Committee intended to convey the impression to the House that the Adjustment Board procedure was compulsory and that a strike called for the purpose of enforcing settlement of grievances without making use of that procedure would be illegal it could have done so at that point. But obviously such a requirement of the Act would have introduced a new principle of compulsion and anti-strike into the Act which would have been contrary to the statement that the amendments introduced no new principles into the Act.

III. THE NORRIS-LaGUARDIA ACT PROHIBITS THE ISSUANCE OF AN INJUNCTION IN THIS CASE.

The Norris-LaGuardia Act, 29 U. S. C. 101 *et seq.*, was enacted to deny jurisdiction to federal courts to issue injunctions in labor disputes. The court below held that that Act did not apply to the instant case. Its decision on that point arises from its holdings in the same case that the Railway Labor Act provides for compulsory adjustment of grievances through the machinery of the National Railroad Adjustment Board; that the Act provides a complete plan for avoiding interruptions to commerce through

the medium of compulsory adjustment of grievances; and that to apply the provisions of the Norris-LaGuardia Act to the instant case would render nugatory the compulsory adjustment of grievances under the Railway Labor Act. Based thereon, the court below held that the Railway Labor Act operated to repeal the provisions of the Norris-LaGuardia Act and that it was authorized to issue an injunction to prevent the strike arising out of the grievance disputes.

A strikingly similar situation was presented to the Court of Appeals for the Fifth Circuit in the case of *Brotherhood of Railroad Trainmen, et al. v. Central of Georgia R. Co.*, 229 F. 2d 901, in which a conclusion was reached directly opposite to that of the Court of Appeals in the instant case. The Court of Appeals for the Fifth Circuit held that the Norris-LaGuardia Act deprived federal courts of jurisdiction to issue injunctions against strikes and that the court had no jurisdiction to order an injunction, whether the purpose of the strike was or was not illegal. It held that the decisive and fundamental questions were whether there was a labor dispute and an injunction was sought in such a dispute. Since that case did involve a labor dispute the court held that the Norris-LaGuardia Act denied jurisdiction to issue an injunction. This case has been accepted for review by this Court, and is No. 84, October Term, 1956.

The court below for its holding on the question of authority to issue the injunction, relied largely upon two previous decisions of this court involving enforcement of provisions of the Railway Labor Act, to wit, *Texas & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks*, 281 U. S. 548, and *Virginian Ry. Co. v. System Federation, etc.*, 300 U. S. 515. It quoted from the *T. & N. O.* case as follows:

"The creation of a legal right by language suitable to that end does not require for its effectiveness the imposition of statutory penalties. Many rights are enforced for which no statutory penalties are provided. * * * The right is created and the remedy exists."

From the *Virginian Railway* case is quoted:

"Neither the purposes of the later Act, as amended, nor its provisions when read, as they must be, in the light of our decision in the Railway Clerks case, supra (281 U. S. 548) lend support to the contention that its enactments, which are mandatory in form and capable of enforcement by judicial process, were entitled to be without legal sanction."

At the time of the decision in the *T. & N. O.* case (1930) the Norris-LaGuardia Act (1932) had not been enacted. However, the injunction in that case was based upon the provision then and now found in § 2, Third, of the Railway Labor Act, 45 U. S. C. § 152, Third, which gave the employees as well as the carrier the positive right to designate representatives "without interference, influence or coercion" by the other party, and upon the direct prohibition that "neither party shall in any way interfere with, influence or coerce the other in its choice of representatives." In that connection Mr. Chief Justice Hughes, speaking for the court, said, p. 567:

"It is at once to be observed that Congress was not content with the general declaration of the duty of carriers and employees to make every reasonable effort to enter into and maintain agreements concerning rates of pay, rules and working conditions, and to settle disputes with all expedition in conference between authorized representatives, but added this distinct prohibition against coercive measures. * * * While an affirmative declaration of duty contained in a legislative enactment may be of imperfect obligation because not enforceable in terms, a definite statutory

prohibition of conduct which would thwart the declared purpose of the legislation cannot be disregarded."

Similarly, in the *Virginian Railway* case, the court was enforcing a positive duty of the carrier, namely, "the command of the statute to negotiate for the settlement of labor disputes," p. 559, (45 U. S. C. § 152, First, Second).

The language of the involved sections of the statute is in § 152, First, that:

"It *shall be the duty* of all carriers * * * and employees to exert every reasonable effort to make and maintain agreements, etc."

and in § 152, Second:

"All disputes between a carrier or carriers and its or their employees *shall be* considered and if possible decided with all expedition in conference between representatives, etc."

It is thus clear that in these cases both the duty and the prohibition were clearly expressed and "mandatory in form." These cases therefore are to be distinguished from the instant case where, as heretofore discussed, there is no mandatory requirement that grievances shall be submitted to the Adjustment Board but only a provision that they may be submitted. The holding of this court, therefore, in the *Virginian Railway* case, that a specific obligation mandatory in form is not within the limitations of the Norris-LaGuardia Act, has no application to the language of § 153, First (i). Since the invocation of the services of the National Railroad Adjustment Board is permissive only and not required, it cannot be claimed that provisions of the Railway Labor Act "mandatory in form" would be thwarted by a declination to invoke the service of this Board, and in, the alternative, resort to a strike. To hold, as did the court below, that the threatened

strike was illegal because it construed that the permissive language of the Act made resort to the Board compulsory, is to disregard or ignore the definite construction of this court of the adjustment functions provided in the Act as expressed in *Moore v. I. C. R. Co. supra*, that "the Railway Labor Act shows a consistent purpose on the part of Congress to establish and maintain a system for peaceful adjustment and mediation voluntary in its nature."

IV. THE EFFECT OF THE DECISION OF THE COURT BELOW WILL BE TO IMPEDE RATHER THAN PROMOTE THE SETTLEMENT OF GRIEVANCES, CONTRARY TO THE PURPOSES OF THE ACT.

At the outset of this brief we expressed the conviction that the instant case is of greatest concern to railroad employees. It is our belief that the effect of an interpretation that § 3, First (i), provides for compulsory arbitration of employee grievances by the National Railroad Adjustment Board will be to impede rather than promote the settlement of such disputes. The permissive nature of resort to the Board appearing from the express provisions of the section has practical advantages in making such settlements which compulsory arbitration would destroy. Included among such advantages is the paramount necessity of encouraging, not minimizing, the settlement of such disputes by collective bargaining.[1]

---

[1] Commissioner Eastman, at the hearings on the 1934 amendments, referred to the necessity of the organizations and the railroads "settling all disputes if they can at home" to prevent flooding the Adjustment Board with cases (Hearings before House Committee on H. R. 7650, 73rd Cong., 2nd Sess., p. 48).

In the amici brief of the Brotherhood of Locomotive Engineers and the Brotherhood of Railroad Trainmen filed upon reargument of the Elgin, Joliet & Eastern Railway Company case, No. 160, October Term 1944, an indication was given of the

(Continued on next page)

It must be borne in mind that the initiative in submitting and progressing their grievances and claims is always upon the employees. At the management level it is always within the power of management to deny such grievances or claims. Under the decision below this option of management, as we shall shortly point out, is fraught with most serious consequences in its application to "on the property" settlements. It also has practical consequences in the enforcement of Board awards.

(Continued from preceding page)

volume of such grievance disputes by reference to the annual statistics of the Brotherhood of Railroad Trainmen, and the following statement was made:

> "For the year ending June 30, 1944, the Adjustment Board reported that the B. of R. T. filed 979 bases before Division 1. The Report of the president of the B. of R. T. for the year 1944 discloses that during this year the organization's vice presidents and deputy presidents, in assisting B. R. T. general committees, handled 3951 grievance cases with railroad managements. The claims in such cases were disposed of as follows: allowed or compromised 2416; withdrawn 541; referred to National Railroad Adjustment Board 113; to be handled further on the property 881. These statistics show that the 113 cases thus referred to the Adjustment Board are less than 3 per cent of the total handled by the grand officers. If this ratio be applied to the 979 B. R. T. cases filed with the Board during the year ending June 30, 1944 —which include the number filed without grand officer assistance—it would appear that the Brotherhood's general committees handled some 38,000 grievances on the properties in one year for this single organization. The figure reaches its true significance when the volume of grievances dealt with at local levels is considered. General committees prosecute only the unadjusted grievances referred to and accepted by them when local committee action fails. It is estimated that no more than 5 to 10 per cent of the grievances handled by local committees ever reach the general committees. While these estimates are not precise, enough has been said to indicate the great magnitude of such grievances."

Copies of the aforementioned report were furnished to the court and counsel, and it was stated that the report is on file in the Library of Congress.

The burden on the employees to progress and the power of management to deny do not in practical effect really shift when resort to the Board is had. For even if the employee wins his case and receives an affirmative award, the carrier is free—absent the deterrent of the possible use of economic strength by the union—to disregard the award and order, subject only to the statutory enforcement suit which must be brought by the claimant pursuant to § 3, First (p). Thus it would be within the power of the carrier, by refusing to comply, to force every employee to bring an enforcement suit. In such a contest the employees are unequal to management in financial, legal and other resources, despite the "advantages" given to them by the provisions of sub-paragraph (p).

The practical problems presented by this situation were exposed in the testimony of George M. Harrison in the hearings on the Donnell bill.

Mr. Harrison submitted data (Hearings, *supra*, p. 177) indicating that the Board, in the first six years of its experience, found in cases submitted to it, that the carriers had violated the employees' agreements 10,998 times. He then went on to say:

> "For the most part the carriers have applied the awards rendered by the Board, although their failure to do so has resulted in some litigation and caused some strikes. I know of no cases where the employees have not accepted adverse awards of the Board. The carriers' witnesses complained bitterly about these few strikes because the act provides a method of enforcing decisions of the Board through an action in the courts. It must be apparent to anyone familiar with labor-management relations that if the carriers ever force the common use of court procedure in the enforcement of awards of the Adjustment Board, the employees will be compelled to return to the use of

economic strength in contract violations in the first instance and refrain from handling cases with the Board. The provisions of this bill providing for a court review of the awards of the Board will completely destroy the effectiveness of the Board and place in the hands of the carriers a weapon with which they will be able to delay the settlement of all disputes, involving the interpretation or application of agreements, with the result that many strikes will inevitably follow."

We concede that, for the most part, as Mr. Harrison put it, the carriers have complied with the awards rendered against them by the Board. But the record of such compliance has been made against the historical background, until the decision below, that the employees were legally free to use economic strength against an obdurate management. If the ability to strike is taken away there is no assurance that the present degree of compliance with awards will continue.

As suggested above, the weapon of compulsory arbitration which the decision below makes available to the railroads will, in a still more important way, impede the settlement of such disputes. It will place in the hands of management the unrestrained ability to deny claims at the carrier level which are now subject to bona fide bargaining between parties who are relatively equally matched as negotiators—the carrier with its prerogative of denying claims and the employers with their option to resort to the Board but equipped with the alternative of using economic sanctions if needed.

For example, in the case of time claims—which cost the railroads money when allowed—the invitation to deny such claims, often as a matter of routine, will be particularly attractive. For by so doing managements can ulti-

mately force the employees, under the decision below, to bear the heavy burden and disastrous consequences, hereinafter noted, of taking all such claims to the Adjustment Board. A construction of the Act which would allow this to happen would, we submit, frustrate the provisions of the Act which contemplate as the first step the handling of such disputes in the "usual manner" in conferences between the parties, thus looking to settlement by collective bargaining (§§ 2, Second; 3, First (i)). Once a carrier determines upon a policy of denying such grievances and claims in "on the property" negotiations, if the next step is compulsory, the employees would have no alternative but to resort to the Board. In the absence of any right to collectively bargain for the adjustment of such claims the employees will be helpless and at the mercy of an obstinate carrier.

In this connection attention may be profitably directed to certain trends in the experience with grievance adjustment which, we believe, may become unfortunate realities if the use of the Board machinery is held to be compulsory.

These trends are noticed in certain of the findings of Mr. E. J. Connors, Vice President of the Union Pacific Railroad, who was appointed by President Roosevelt in 1945 and was continued in his assignment by President Truman, to report on the conditions on the First Division of the Board which gave concern. Mr. Connors' report, as released by the National Mediation Board January 21, 1947, stated:

> "The First Division has been the subject of conferences between representatives of the railroads and the Brotherhoods, and numerous investigations over practically the entire period of its existence. Review

of the investigations indicates an atmosphere of more heat than light. In the conferences argument concerning procedural changes and the precedent principle obscured the fact that the *Division had become a substitute for, rather than a supplement to, the settlement effort on the individual railroads.*" (Emphasis supplied).

Mr. Connors continued, p. 7:

> "There has been a gradual substitution of adjustment machinery for the conference method of settlement. The existence of the Board has steadily tended to defeat the efforts, both of the employee representatives and management, to settle grievances locally and engendered hundreds of appeals on unimportant and trivial controversies formerly disposed of in conference.
>
> "Awards indicate attempts by railroads to use the Division as a medium of relief from rules or agreed-to practices of their own making, to repudiate previous settlements, or seek reversal of prior decisions."

and at p. 8:

> "An adjustment board has a proper place as a supplement to this effort (prompt disposition of disputes and exertion of every reasonable effort to settle disputes in conference), but its use as a buck-passing institution destroys the conference method of settlement upon which the favorable railroad-labor relations structure has been built."

Under the interpretation made by the court below, the net and perhaps the most important aspect of this problem is the danger that the employees will be forced to flood the Board with a still greater volume of cases than is now stagnating its processes. Bearing in mind, as pointed out in the letter dated September 19, 1956 from the Chairman of the National Mediation Board to the Solicitor General

set forth at p. 27, *supra*, that the backlog of the Board for several years has been in the neighborhood of approximately 3,000 cases, which represents a minimum of five years backlog based on the Board's normal productivity, such additional volume of cases would surely bring about a complete breakdown of the Adjustment Board machinery.

In summary of this point, as this Court is aware from its consideration of the *Washington Terminal Company* and *Elgin, Joliet & Eastern Railroad Company* cases, *supra*, the magnitude and importance of settling grievance disputes is not only very great, but the position of the contending parties over the years, and until the decision of the court below in the instant case, has been in relative balance, due in large part to the fact that the employees were able to strike when necessary. The interpretation of § 3, First (i) as requiring compulsory resort to the Board in the event settlements are not negotiated in prior handling on the property and the employees desire further to progress their grievances, would overturn that balance and turn the machinery afforded by the Adjustment Board into an instrument which could destroy the ability of the employees effectively to prosecute such grievances whether on the property or before the Board. To outlaw the right to strike rather than to merely prevent the necessity for its exercise, and to impose compulsory arbitration of such disputes, would, we submit, be a revolutionary and unwarranted construction, not consistent with either the language or purposes of the Act, framed as it is to provide for permissive resort to the Adjustment Board.

CONCLUSION.

The decision of the Court of Appeals for the Seventh Circuit should be reversed and the injunction heretofore granted by the District Court should be dissolved.

Respectfully submitted,

CLARENCE E. WEISELL,
HAROLD N. MCLAUGHLIN,
1706 Union Commerce Building,
Cleveland 14, Ohio,
Attorneys for Brotherhood of Locomotive Engineers.

HORNBECK, RITTER & VICTORY,
1706 Union Commerce Building,
Cleveland 14, Ohio,
Of Counsel.

APPENDIX.

Pertinent Provisions of Railway Labor Act 45 U. S. C. §§ 151 ff.

"Sec. 151a. General Purposes.

"The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

"Sec. 153. First. There is established a Board, to be known as the 'National Railroad Adjustment Board,' the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

"(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 152 of this title.

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay; rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by

petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

"(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

"Sec. 155. First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

"The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time."

Pertinent Provisions of the Norris-LaGuardia Act
29 U. S. C. §§ 101 ff.

"Sec. 101. No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

"Sec. 104. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

"(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

"Sec. 107. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

"(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

"(b) That substantial and irreparable injury to complainant's property will follow;

"(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

"(d) That complainant has no adequate remedy at law; and

"(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection."